

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Bay State Gas Company

D.T.E. 05-27

THE ATTORNEY GENERAL’S MOTION TO COMPEL RESPONSES TO DISCOVERY

Pursuant to 220 C.M.R § 1.06(6)(c)(4) and G. L. c. 30A §§ 11 & 12, the Attorney General of Massachusetts moves to compel responses to discovery from Bay State Gas Company (“Bay State” or “Company”). Bay State has failed to produce responsive answers to a critical information request regarding the causes of corrosion in the Company’s distribution system, despite a Hearing Officer’s June 2, 2005, directive to respond to outstanding discovery. The Company’s rate case includes a request for approval of a \$300 million accelerated steel replacement program to replace its corroded steel mains and services. The Company should produce the requested information promptly and completely to the Department of Telecommunications and Energy (“Department”) and all intervenors. While the Company retained a corrosion consultant that reviewed its system for more than 1,100 hours over a six month period, AG IR 3-12(b), the Company seems intent on severely curtailing the Attorney General’s ability to investigate the corrosion in the Company’s distribution system.

I. INTRODUCTION.

A. Procedural History.

On April 27, 2005, pursuant to G. L. c. 164, § 94, Bay State filed with the Department a petition seeking approval of tariffs, a performance based regulation plan and other related

mechanisms. The petition seeks a general rate increase of \$22.2 million per year, an increase of 4.7% over 2004 revenues. In addition to this general rate increase, the Company is proposing annual increases for inflation, pipe replacements and changes to pension and pension related benefit costs. Public hearing were held on this matter throughout the Company's service territory on May 25, 2005, May 26, 2005 and May 31, 2005. A procedural conference was held on June 2, 2005. During the procedural conference the Hearing Officer directed the Company to provide all overdue responses to the Attorney General Information Requests ("IRs") sets 1-7 by 5:00 PM Monday, June 6, 2005. The Hearing Officer also directed the Company to provide a list indicating which documents exist or do not exist as they relate to the Attorney General's IRs. On June 5, 2005, the Company filed its response, but did not specifically identify which documents response to the Attorney General's exist. On June 8, 2005, the Attorney General designated a expert witness related to corrosion issues in the Company's distribution system.

On June 10, 2005, the Hearing Officer issued a memorandum setting forth a very aggressive procedural schedule with discovery on the Company closing on June 20, 2005.¹ Hearings are set to commence on July 5, 2005, with intervenor testimony due on July 8, 2005. On June 13, 2005, the Hearing Officer issued ground rules requiring discovery conferences prior to filing motions to compel. Ground Rules, § I (E).²

The Attorney General has issued 18 sets of discovery to date.³ Throughout the discovery

¹ On June 15, 2005, the Attorney General appealed the procedural schedule order.

² The Attorney General had planned to file a motion to compel on June 13, 2005, but received the ground rules just prior to filing the motion. As a result, the Attorney General contacted the Company that same day, and conducted a discovery conference on June 14, 2005, in an attempt to obtain supplemental answers to the Company's responses. *See* Exhibit A.

³The Attorney General issued his first set and second sets of discovery on May 5, 2005.

phase of this case, Bay State has continually failed to respond in a timely manner to the Attorney General's requests. In addition, on several occasions where the Company has responded, the information provided in its responses has been inadequate. However, the Attorney General has been active in seeking additional voluntary responses to discovery from the Company.

II. ARGUMENT.

A. Bay State Has No Adequate Basis For Failing To Respond To The Attorney General's Discovery.

With respect to discovery, the Department's regulations provide:

The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of the issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled.

220 C.M.R. § 1.06(6)(c)(1); *Verizon*, D.T.E. 01-31 (Phase I), Hearing Officer Ruling on Motion to Compel or in the Alternative, to Strike Portions of Verizon's Testimony, p. 1 (2002). Hearing Officers have discretion in establishing discovery procedures and are guided in this regard by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26, et seq. 220 C.M.R. § 1.06(6)(c)(2). Mass. R. Civ. P. 26(b)(1) provides that:

Parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The Department's power to compel is derived from G. L. c. 30A, § 12(1) which provides agencies with the power to require the testimony of witnesses and the production of evidence.

G. L. c. 30A, § 12(3) states, in part, that any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. The Department's rule, 220 C.M.R. § 1.10(9), embodies the statutory authority to compel the appearance of witnesses and production of documents by subpoena.

When a party fails to respond to discovery, the Department has the authority to compel a response, impose appropriate sanctions under Mass. R. Civ. P. 37 and take other remedial steps.

220 C.M.R. § 1.06(6)(c)(4). The following sanctions are available to the Department:

- (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) An order refusing to allow the disobedient party to support or oppose, designated claims or defenses or prohibiting him from introducing designated matters in evidence;
- (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Mass. R. Civ. P. 37(b)(2).

The Attorney General promptly issued his discovery requests and the Company took nearly thirty days to respond, and only after the Hearing Order directed the Company to answer. June 2, 2005, Procedural Conference Transcript ("Tr."), pp. 32 -35. These answers that the Company provided were insufficient. After an extensive discovery conference, which addressed dozens of unanswered IRs from AG sets 1 to 7 or inadequate responses, the parties were unable

to agree to the responses for AG 2-18.⁴ Bay State is under an obligation to respond with available information in a prompt manner, and it has not.

1) Discovery Request AG 2-18

On May 5, 2005, the Attorney General asked the following question:

Produce copies of all reports, memorandums and analysis related to any external causes of corrosion of the mains and services (including, but not limited to, proximity to other pipes, materials or sources of electricity) that are the subject of the Company's proposed replacement program.

Bay State's Response.

On June 6, 2005, the Company answered as follows:

Please see Bay State's response to AG 2-16.

AG 2-16 asked the Company:

*Produce copies of all reports, memorandums and analysis related to the mains and services replacement program in the Company's service territories prepared by **outside** experts. (emphasis added).*

The Company answered:

Attachment AG 2 - 16 (a) is a copy of a report produced by RJ Rudden regarding the Comparison of Industry Corrosion Leak Data to Bay State Gas Company.

⁴ Pursuant to Ground Rule, § I (E), the Attorney General certifies that he initiated a discovery conference which occurred via telephone on June 14, 2005 at approximately 12:00 noon and concluded at 1:30 PM, with brief follow-up on June 15, 2005, initiated by the Company. The conference call involved Alexander J. Cochis and Karlen Reed for the Attorney General and Robert Dewees and Patricia French for the Company. While the Attorney General and the Company reached agreement on several outstanding IRs, and continue to work on obtaining responses for others, the parties could not reach agreement on all issues.

Attachment AG 2 - 16 (a) is a copy of a report produced by RJ Rudden regarding Distribution Infrastructure Replacement.

The Company will supply the supporting workpapers to Attachment AG 2-16(b) in a supplemental response, as this is a bulk document.

Attorney General's Legal and Factual Argument.

The Company did not respond fully to the request, nor did it comply with the Hearing Officer's directive to identify responsive documents. The Company is seeking approval of a new and controversial rate mechanism that could added over \$300 million in plant to rate base over several years. According to the Company, despite its best efforts, an uncontrollable system leak rate looms unless customers pay for the accelerated system replacement of both bare and unprotected coated steel. However, mains and services deteriorate at predictable rates given soil conditions and other knowable factors. With the appropriate installation, monitoring, repair and replacement, the Company should not suddenly find itself with an uncontrollable corrosion leak rate, especially at the end of a merger rate freeze during which the Company had an obligation not to defer needed replacements until after the freeze.

The Attorney General's request asks for reports, memorandums and analysis related to any external causes of corrosion on the Company's distribution system. This information is very important. The Company responded by producing two recent reports from an outside consultant, but those reports are hardly a complete response. Since the Company is experiencing an unusually accelerating leak rate on just one type of material, unprotected coated steel in the Brockton and Lawrence areas, AG-2-1(1 of 4)(3 of 4), it is critical that the Company produce

any reports or other documents which offer an explanation. The requested information is relevant, probative and admissible on issues raised by the Company's steel replacement program. Furthermore, the Attorney General has designated an expert to offer testimony on the Company's corrosion problems in its distribution system. Without access to the requested information, the Attorney General's witness will not be able fully to prepare prefiled testimony, which is due July 8, 2005.

Rather than agree to produce the requested information or identify the specific documents available, during the discovery conference the Company offered the Attorney General the opportunity to visit various field claims offices to search numerous filing cabinets that contain thousands of pages of documents in "work dossiers." The Company later offered a chance to search the Company's computerized Work Order Management System. As stated by the Attorney General at the June 2, 2005, procedural conference, without meaningful identification by the Company of what types of documents exist (i.e., reports from outside corrosion experts, weekly or monthly management reports on pipe leaks, root causes analyses for the accelerating leak rate, etc.), and where these documents might be located, an offer to inspect the Company's documents or search a data base is an inadequate solution, especially so late in the discovery process. The Company knows, or should know, generally what documents it maintains and where they can be found. Intervenors should not be forced to search various computers, filing cabinets and map rooms in different geographic locations in the hopes of locating important documents. *See* June 5, 2005, Company discovery status letter to Department (Company refuses to produce documents or state which specific corrosion related documents exists, but invites the

Attorney General to hunt for them in numerous field offices and filing cabinets). The Company took a month to respond to the information request and then only offered a chance for the Attorney General to search for the desired information. In a complex rate case with short statutory deadlines, such dilatory tactics should not be approved by the Department. The Attorney General has served relevant and probative discovery regarding the Company's petition and should be entitled to timely responses so as not to delay or hinder these time constrained proceedings.

III. CONCLUSION.

As explained fully above, the motion to compel discovery responses should be granted. Under the controlling standards of review, the Attorney General is entitled to responses to the discovery issued. The Company cannot, and must not be permitted, to withhold relevant information from discovery that is particularly within its knowledge.

Wherefore: The Attorney General requests an Order that the Company respond fully and completely to AG 2-18 within three (3) business days of the order by specifically identify the types of documents responsive to the request, and producing copies of the requested materials for the bare steel and unprotected coated steel mains and services replaced since 1990 in the Brockton and Lawrence service territories. Given the Company's dilatory tactics on such an important issue, and the Company's disregard for the Hearing Officer's directives, the Department should exclude from record of this case proof that the Company's mains and services installation, monitoring, repair and replacement efforts have been prudent.

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Respectfully Submitted,

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